
(2002) 10 BOM CK 0091

In the Bombay High Court

Case No : Criminal Appeal No"s. 522 of 543 of 2002

Mohammad Allimuddin

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-10-2002

Acts Referred:

Prevention of Terrorism Act, 2002 — Section 34(4), 49(2)

Citation : (2003) 3 MhLj 92

Hon'ble Judges : R.K. Batta, J;P.S. Brahme, J

Bench : Division Bench

Advocate : S.V. Manohar, in Cri. Appeal No. 543 of 2002, M.H. Rizwy, A.M. Rizwy and V.R. Manohar, Special, for the Appellant; Loney, Assistant Public Prosecutor, for the Respondent

Judgement

R.K. Batta, J.—In these appeals, both the appellants have been arrested in the same crime No. 27/2002, under Sections 363, 368, 143, 147, 148, 149 and 121 of the Indian Penal Code read with Sections 3/25 of the Arms Act and Section 3(3) of the Prevention of Terrorism Act, 2002 (hereinafter referred as "POTA"). Both the appellants were arrested on 12-6-2002. The appellant Ahmed Abdul Nayeem in criminal appeal No. 543/2002 had filed a writ petition for quashing the F.I.R. The said writ petition No. 255/2002 was dismissed by this Court vide order dated 19-9-2002.

2, According to the appellants, period of 90 days from the date of their arrest, excluding the date of arrest, was over on 10-9-2002. Accordingly, both the appellants filed bail applications before the Designated Special Court on 11-9-2002. The learned A.P.P. was asked to file reply on the same, which was filed on 11-9-2002 itself opposing it and on 12-9-2002, the Public Prosecutor filed report under Section: 49(2) of POTA for extension of period of detention of the appellants upto 180 days. On 12-9-2002, the investigating officer also filed an application seeking magisterial custody remand of the appellants from 12-9-2002 to 19-9-2002. The Designated Court disposed of the bail applications,

as also the application for Magisterial custody remand from 12-9-2002 to 19-9-2002 filed by the investigating officer and the report filed by the Public Prosecutor by two separate orders. The bail applications of the appellants were rejected. The application filed by the investigating officer for extension of Magisterial custody remand from 12-9-2002 to 19-9-2002 was granted. The report filed by the Public Prosecutor was partly allowed.

3. The appellants have come in the appeals against the said orders in terms of Section 34(4) of POTA. In criminal appeal No. 522/2002, in addition to challenge to refusal of bail, the appellant also challenged extension granted by order dated 12th September, 2002. In criminal appeal No. 543/2002, though the appellant had not, initially, challenged the order of extension dated 12th September, 2002, yet leave was sought to add grounds to take the said challenge as well, which was allowed.

4. We have heard the learned Advocates appearing on behalf of the Appellants and the learned A.P.P. Mr. Loney.

5. The learned Senior Counsel Mr. V. R. Manohar, appearing in criminal appeal No. 543/2002, took us through the relevant and connected provisions including Section 49 of POTA, as also, Section 167(2) of the Code of Criminal Procedure and relying upon a number of judgments of the Apex Court, urged before us that, on completion of 90 days if the charge sheet is not filed and no extension for investigation is sought, the accused gets an indefeasible right to be released on bail, which cannot be frustrated by keeping the bail application pending. For these propositions, reliance was placed by the learned Senior Counsel on judgments of the Apex Court in Sanjay Dutt Vs. State through C.B.I., Bombay, ; Union of India (UOI) Vs. Thamisharasi and Others, ; Mohamed Iqbal Madar Sheikh and Others Vs. State of Maharashtra, ; Uday Mohanlal Acharya Vs. State of Maharashtra, and the conclusions 2 and 4 at page 473; and State of Maharashtra Vs. Bharati Chandmal Varma @ Ayesha Khan, .

6. The learned Advocate in criminal appeal No. 522/2002 stated that he has nothing more to add.

7. The learned A.P.P., on the other hand, argued before us that the order passed u/s 167(2) of the Code of Criminal Procedure is interlocutory order and no appeal lies; that Section 49 of POTA does not prescribe any period during which the extension is to be sought and the prosecuting agency can apply for extension, at any time, after expiry of 90 days till 180 days. According to the learned A.P.P., the application for extension, as required u/s 49(2) of POTA had been filed and the said application for extension was granted and in view of grant of the said application, the applications for bail were rightly rejected.

8. It was considered necessary to hear further the learned Advocate for the appellants and the learned public prosecutor. In view of the ratio laid down in the judgment of the Apex Court in Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, , which, prima facie had material bearing on the issue

before us and also in view of the fact that the Constitution Bench, after quoting para 30 from the said judgment of *Hitendra Thakur v. State of Maharashtra* (supra), had explained it in Para 48 in *Sanjay Dutt Vs. State through C.B.I., Bombay*, , as also, the said judgment was referred in *Uday Mohanlal Acharya Vs. State of Maharashtra*, and more particularly since the conclusions drawn in para 48 and 53(2)(a) and (b) in *Sanjay Dutt v. State Through C.B.I. Bombay (II)* (supra) had been specifically quoted in the *Uday M. Acharya's* case in paras 7 and 8.

9. In further arguments, Mr. V. R. Manohar, the learned senior counsel, urged before us that some of the observations made in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra) in paragraph 30 are contrary to the earlier findings arrived at in paras 20 and 21 of the said judgment; that there was no report of the public prosecutor as envisaged by Section 20(4)(bb) of TADA in the said case; that the real and the only question for determination in the said case was that, in the absence of a report for extension, was the accused entitled to statutory bail/bail in default on expiry of the period of filing the charge sheet and in this respect, our attention has been drawn to the observations of Apex Court at pages 626 and 627 of the said judgment. In the light of this, it has been urged that some of the observations made in para 30 of the said judgment can neither be said to be ratio nor even obiter dictum since the Apex Court was not, in fact, dealing with the question on which some of the said observations have been made. Relying upon the judgment of the Division Bench of this Court in *Mohandas Issardas and Others Vs. A.N. Sattanathan and Others*, , and judgments of Apex Court in *The State of Orissa Vs. Sudhansu Sekhar Misra and Others*, , *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, , *Gasket Radiators Pvt. Ltd. Vs. Employees' State Insurance Corpn. and Another*, , it has been urged that a decision is only an authority for what it actually decides; what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. We shall deal with these submissions made by the learned senior counsel, in detail, at a later stage while dealing the matter on merits.

10. The other aspect on which arguments have been advanced by the learned senior counsel relate to the scope of Section 49 of POTA. In this connection, it has been pointed out, after placing reliance on the judgment of the Apex Court in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra), that the period beyond 90 days can be extended by the Special Court only on the report of the Public Prosecutor indicating progress of investigation and specific reasons for detention of the accused beyond the said period of 90 days. According to Mr. Manohar, the learned senior counsel, the provisions of Section 49(2)(b) of POTA are required to be strictly complied with and in this connection, it has been pointed out that the report of Public Prosecutor, which was filed before the Special Court, neither shows application of mind nor it discloses specific reasons for detention of the accused beyond the said period of 90 days.

It is also pointed out that both the appellants were not even produced before the Court when the application for extension was considered by the Special Court. Mr. V. R. Manohar, the learned senior counsel has also found fault with the orders passed by the Special Court on extension application, as also, the bail applications. According to the learned senior counsel, on account of non-compliance of Section 49(2)(b) of POTA, the appellants are entitled to be released on bail.

11. Mr. S. V. Manohar, the learned counsel for the appellant in Criminal appeal No. 522 of 2002, has adopted the arguments advanced by Mr. V. R. Manohar, the learned senior counsel.

12. The learned Public Prosecutor, on the other hand, has urged before us that the judgment of the Apex Court in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* is crystal clear and there is no ambiguity in the findings, as also, conclusions. In respect of compliance of Section 49(2)(b) of POTA, it is stated that not only progress of investigation was mentioned in the report filed by the Public Prosecutor but the investigating agency had placed all case papers, as also, the case diaries before the Special Court and it is only after going through the said papers and after having satisfied about progress of investigation that the Special Court had granted extension. Therefore, the learned Public Prosecutor contends before this Court that the appellants are not entitled for bail.

13. In two sets of cases, the Apex Court has considered the scope and ambit of Section 167(2) of the Code of Criminal Procedure as it is and where provision for extension beyond 90 days for carrying out investigation is incorporated in various Acts for the purpose of Section 167 of the Code of Criminal Procedure. The first set of cases are under the Narcotic Drugs and Psychotropic Substances Act, offences under the Indian Penal Code and the Maharashtra Prevention of Dangerous Activities Act. In this connection, rulings of the Apex Court in *Union of India (UOI) Vs. Thamisharasi and Others*, and *Uday Mohanlal Acharya v. State of Maharashtra* have been cited. In these cases, the question of extension for the purpose of investigation beyond 90 days was not required to be considered. The second set of cases are under TADA and The Maharashtra Control of Organised Crime Act, 1999. The cases under TADA and M.C.O.C.A., which have been cited are *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.*, *Sanjay Dutt v. State Through C.B.I. Bombay (II)*, *Mohamed Iqbal Madar Sheikh and Others Vs. State of Maharashtra*, and *State of Maharashtra Vs. Bharati Chandmal Varma @ Ayesha Khan*, .

14. The provisions of TADA and M.C.O.C.A. are *pari materia* to the provisions under POTA. Therefore, it is necessary, at this stage, to refer to the *pari materia* provisions of these Acts. Section 20(4) of TADA provides for modified application of certain provisions of the Code and lays down in Sub-section (4) as under :

"Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the

modifications that--

(a) the reference in Sub-section (1) thereof to "Judicial Magistrate" shall be construed as a reference to "Judicial Magistrate or Executive Magistrate or Special Executive Magistrate";

(b) the references in Sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", whenever they occur, shall be construed as references to "sixty days", "one hundred and eighty days" and "one hundred and eighty days", respectively; and

(bb) in Sub-section (2), after the proviso, the following proviso shall be inserted, namely;

Provided further that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period upto one year, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and

(c) Sub-section (2-A) thereof shall be deemed to have been omitted.

15. Section 21 of M.C.O.C.A., which deals with modified application of certain provisions of the Code, reads as under :

"Modified application of certain provisions of the Code :

1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act, shall be deemed to be a cognizable offence within the meaning of Clause (c) of Section 2 of the Code and "cognizable case" as defined in that clause shall be construed accordingly.

2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in Sub-section (2),--

(a) the references to "fifteen days" and "sixty days" wherever they occur, shall be construed as references to "thirty days" and "ninety days" respectively;

(b) after the proviso, the following proviso shall be inserted, namely--"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period up to one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days."

16. The relevant provisions in POTA, are found in Section 49, which reads as under :

"Modified application of certain provisions of the Code :--

1) -Notwithstanding anything contained in the Code or any other law, every

offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of Clause (c) of Section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.

2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in subsection (2),--

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days", respectively; and

(b) after the proviso, the following proviso shall be inserted, namely :--"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days :

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person from judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody."

17. In this background, we shall now refer to the judgment of the Apex Court in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra). In this case, on 6-7-1993, the appellant Hitendra Vishnu Thakur had filed an application for grant of bail u/s 20(4) of TADA on the ground that 180 days had expired on 4-6-1993 and no charge-sheet/challan had been filed. On 12-7-1993 the Public Prosecutor presented a request of the Investigating Officer dated 29-6-1993 to the Designated Court seeking extension of time to complete the investigation and objections were also filed to the application for bail, filed by appellant Hitendra Vishnu Thakur u/s 20(4) of the Act, by the Public Prosecutor. It is in this background that the whole controversy had been examined by the Apex Court. The Apex Court formulated three meaningful questions and the third of the said questions is "What is the true ambit and scope of Section 20(4) and Section 20(8) of TADA in the matter of grant of bail to an accused brought before the Designated Court and the factors which the Designated Court has to keep in view while dealing with an application for grant of bail u/s 20(4) and for grant of extension of time to the prosecution for further investigation under Clause (bb) of Section 20(4) and incidentally whether the conditions contained in Section 20(8) of TADA control the grant of bail u/s 20(4) of the Act also? Thus, the question relating to the factors that the Designated Court has to keep in view while dealing with the application for grant of bail u/s 20(4) and for grant of extension of time to the prosecution for further investigation under Clause (bb) of Section 20(4) was directly before the Apex Court. Therefore, the contention advanced by the learned Senior Counsel that some of the observations made in

para 30 cannot be treated as ratio or obiter dicta, has absolutely no merit. Though there was no report of the Public Prosecutor in the said case, yet the Public Prosecutor had presented a request of the Investigating Officer dated 29th June, 1993 to the Designated Court seeking extension of time to complete the investigation and objections were also filed to the application for bail u/s 20(4) of the Act by the Public Prosecutor. In this view of the matter, it is not necessary to dilate further on the rulings quoted by the learned senior counsel on the question of ratio decidendi, obiter dictum and casual observations.

18. The learned senior counsel then urged before us that some of the conclusions found in para 30 of the judgment in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra) are contrary to the findings contained in paras 21 and 22 of the said judgment. According to the learned senior counsel, the Apex Court, in para 21, has observed that the accused is required to make an application if he wishes to be released on bail on account of the "default" of the investigating/prosecuting agency and once such an application is made, the Court shall issue notice to the Public Prosecutor who may either show that the prosecution has obtained the order for extension for completion of investigation from the Court under Clause (bb) or that the challan has been filed in the Designated Court before expiry of the prescribed period or even that the prescribed period has actually not expired and thus resist the grant of bail on the alleged ground of "default". It has also been pointed out that, the Apex Court, in the said judgment, had held that the Court had no power to remand accused beyond the period prescribed by Clause (b) of Section 20(4) of TADA or extended under Clause (bb) of the said section as the case may be, if the challan is not filed. In this context, it has been urged that the conclusion in para 30 is not supported by findings in para 21 of the said judgment and the said observations are to the effect that it is, however, permissible for the Public Prosecutor to resist the grant of bail by seeking an extension under Clause (bb) by filing a report for the purpose before the Court. However, no extension shall be granted by the Court without notice to an accused to have his say regarding the prayer for grant of extension under Clause (bb) and that, in this view of the matter, it is immaterial whether the application for bail on the ground of "default" u/s 20(4) is filed first or the report as envisaged by Clause (bb) is filed by the Public Prosecutor first so long as both are considered while granting or refusing bail.

19. The Apex Court, in paragraphs 20 to 29, has discussed in detail as to the procedure to be adopted when an application for bail is filed after the period of 90 days is over and extension has not been sought, as also, the situation where extension is sought. In para 23, it has been laid down by the Apex Court that where either no report as is envisaged by Clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under Clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court "shall" release him on bail if he furnishes bail as required by the Designated Court. It is further observed that where the Designated Court

declines to grant such an extension, the right to be released on bail on account of the "default" of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by Sub-section (4) of Section 20 of TADA. It is in this view of the matter that, when an application for bail is filed, notice is required to be given to the Prosecutor and likewise, when an application for extension is filed by Public Prosecutor, notice is required to be given to the accused and this notice to the accused is stated to be sufficient if the accused appears before the Court and he is informed of the request of public prosecutor for the purpose of extension. This procedure has been evolved so as to have fair play and to give an opportunity to both the sides to oppose the applications filed by the respective parties. It is in this context that the conclusions in para 30 have been arrived at as under :

"In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail u/s 20(4) has to make an application to the court for grant of bail on grounds of "default" of the prosecution and the court shall release the accused on bail after notice to the public prosecutor influenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail u/s 20(4) of TADA and both the provisions operate in separate and independent fields. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under Clause (bb) by filing a report for the purpose before the Court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under Clause (bb). In this view of the matter, it is immaterial whether the application for bail on ground of "default" u/s 20(4) is filed first or the report as envisaged by Clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by Clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under Clause (bb), the court shall release the accused on bail as it would be an infeasible right of the accused to be so released. Even where the court grants an extension under Clause (bb) but the charge sheet is not filed within the extended period, the court shall have no option but to release the accused on bail if he seeks it and is prepared to furnish the bail as directed by the court. Moreover, no extension under Clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specifically contained in Clause (bb) which must be strictly construed."

20. It is pertinent to note that the Constitution Bench of the Apex Court in *Sanjay Dutt v. State Through C.B.I. Bombay (II)* (supra), while dealing with the question No. 2, which is : "The proper construction of Clause (bb) of Sub-section (4) of Section 20 of the TADA Act indicating the nature of right of an accused to be released on bail thereunder, on the default to complete investigation within the time allowed therein" has been considered in paras 43 to 49 of the said judgment. The Constitution Bench of the Apex Court has quoted para 30 of the

judgment of the Apex Court in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and others* (supra), wherein the conclusions are summarized and we have already quoted the above paragraph from the said judgment. In this connection, we would like to quote the observations of the Constitution Bench in the case of *Sanjay Dutt v. State Through C.B.I. Bombay (II)* (supra) in para 48, which read as under

"We have no doubt that the common stance between us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4) (bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 Cr.P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of rule, the custody or detention is on the basis of a valid order."

21. It is pertinent to note that the Constitution Bench of the Apex Court has observed that the Division Bench (referring to *Hitendra Thakur's* case) also indicated that if there be such an application for release on bail and also a prayer for extension of time to complete investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is significant to note that the Apex Court has further observed that it is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected and the Constitution Bench of the Apex Court further observed that, in short, grant of bail in such circumstances is also subject to refusal of prayer for extension of time if such a prayer is made.

22. In view of the above, we do not find any merit in the submission of the learned senior counsel, insofar as his argument relating to contradictory findings and conclusion, ratio decidendi, obiter dictum and casual observations are concerned.

23. The factual position in the appeals under consideration is that the period of 90 days had expired on 10-9-2002. The applications for bail were filed on 11-9-2002, interim reply to bail applications was filed on 11-9-2002 and further request was made to grant time to file detailed reply and the application for extension was filed on 12-9-2002 by the investigating officer, as also, by Public Prosecutor. Therefore, necessarily, in the light of the observations made by the Apex Court in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra), notice of the bail applications was required to be given to the State; which notice was, in fact, given and the investigating officer, as also, the Public Prosecutor filed application for extension on 12-9-2002. Both these applications were considered together and were disposed of by two separate orders by the Designated Court on 12-9-2002.

24. At this stage, we shall refer to the applications filed by the investigating officer and the Public Prosecutor for extension on 12-9-2002. The application filed by the investigating officer is titled "Magisterial Custody Remand." Reference to Section 49 of POTA relating to power for extending the period of magisterial custody remand beyond 90 days is made in this application and the application, in fact, seeks magisterial custody remand of the appellants to be extended from 12-9-2002 to 19-9-2002 on the ground that the statements of important witnesses are to be recorded; absconding accused are to be arrested and similarly, additional evidence is to be collected against the appellants. Strictly speaking, this application is not for extension as contemplated u/s 49(2) (b) of the Act since what is said in this application is extension of magisterial custody remand from 12-9-2002 to 19-9-2002.

25. The application filed by the Public Prosecutor is in no way better than what is filed by the investigating officer. Though in the said application, which is stated to be a prosecutor's report u/s 49(2) of POTA for extension of period of detention, the prayer is for extension of period of the appellants to 180 days, the application is not properly worded, since what is to be extended is the period to complete investigation and if the same is granted, the grant of magisterial custody remand, depending upon the facts of each case, will be required to be extended. Nevertheless, without going into substance of the applications ignoring the technical aspect and even treating the two applications as applications for extension of the period for the purpose of completing investigation, we have to see whether the requirements u/s 49(2)(b) have been duly complied with or not.

26. In this connection, we may refer to the judgment of the Apex Court in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra). The Apex Court, in para 20, has observed that an obligation is cast upon the court, when after the expiry of the maximum period during which an accused could be

kept in custody, to decline the police request for further remand except in cases governed by Clause (bb) of Section 20(4) of TADA. It is further pointed out that there is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. In paragraph 21 it is laid down that once the period for filing the charge sheet has expired and either no extension under Clause (bb) has been granted by the Designated Court or the period of extension has also expired, the accused person would be entitled to move an application for being admitted to bail under Sub-section (4) of Section 20 TADA read with Section 167 of the Code and the Designated Court shall release him on bail, if the accused seeks to be so released and furnish the requisite bail. The argument that, on expiry of the period during which investigation is required to be completed u/s 20(4) TADA read with Section 167 of the Code of Criminal Procedure, the court must release the accused on bail on its own motion even without any application from the accused on his offering to furnish bail, was rejected and the Apex Court has observed that the accused is required to make an application if he wishes to be released on bail on account of default of the investigating officer/prosecuting agency and once such an application is made, the Court shall issue a notice to the Public Prosecutor. Issuance of notice would serve the ends of justice if both sides are heard on a petition for grant of bail on account of prosecution's "default". It is further observed that, similarly, when a report is submitted by the Public Prosecutor to the Designated Court for grant of extension under Clause (bb), its notice should be issued to the accused before granting such an extension so that an accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him. The Apex Court found that neither Clause (b) nor Clause (bb) of Sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice. It was observed that issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. It was further pointed out that all these requirements of the principles of natural justice and the issuance of notice to the accused or the Public Prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon and besides this, it would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. It is also observed that there is no prohibition to issuance of such a notice to the accused or the Public Prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such notice to any party. It is in this context that the conclusions have been derived in para 30 of the said judgment.

27. We have already pointed out that the Designated Court disposed of the applications for bail, as also, the application of investigating officer and report of the public prosecutor by separate orders on the same day i.e. to say 12-8-2002.

28. We shall, at this stage, consider the arguments advanced by the learned

senior counsel that for the purpose of extension there has to be scrupulous and strict adherence to the provisions of Section 49(2)(b) of POTA. In this connection, observations made by the Apex Court in para 23 in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra) are required to be mentioned, which are as under:

"We may at this stage, also on plain reading of Clause (bb) of Sub-section (4) of Section 20, point out that the Legislature has provided for seeking extension of time for completion of investigation on a report of the public prosecutor. The Legislature did not purposely leave it to an investigating officer to make an application for seeking extension of time from the court. This provision is in tune with the legislative intent to have the investigations completed expeditiously and not to allow an accused to be kept in continued detention during unnecessary prolonged investigation at the whims of the police. The Legislature expects that the investigation must be completed with utmost promptitude but where it becomes necessary to seek some more time for completion of the investigation, the investigating agency must submit itself to the scrutiny of the public prosecutor in the first instance and satisfy him about the progress of the investigation and furnish reasons for seeking custody of an accused. A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under Clause (bb) to seek extension of time. Thus, for seeking extension of time under Clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with his request or application and report, but his report, as envisaged under Clause (bb), must disclose on the face of it that he had applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in Clause (bb) in subsection (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in

custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor, therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in Clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor. Where either no report as is envisaged by Clause (bb) is filed or the report filed by the public prosecutor is not accepted by the Designated Court, since the grant of extension of time under Clause (bb) is neither a formality nor automatic, the necessary corollary would be that an accused would be entitled to seek bail and the court "shall" release him on bail if he furnishes bail as required by the Designated Court. It is not merely the question of form in which the request for extension under Clause (bb) is made but one of substance. The contents of the report to be submitted by the public prosecutor, after proper application of his mind, are designed to assist the Designated Court to independently decide whether or not extension should be granted in a given case. Keeping in view the consequences of the grant of extension i.e. keeping an accused in further custody, the Designated Court must be satisfied for the justification, from the report of the public prosecutor, to grant extension of time to complete the investigation. Where the Designated Court declines to grant such an extension, the right to be released on bail on account of the "default" of the prosecution becomes infeasible and cannot be defeated by reasons other than those contemplated by Sub-section (4) of Section 20 as discussed in the earlier part of this judgment. We are unable to agree with Mr. Madhava Reddy or the Additional Solicitor General Mr. Tulsi that even if the public prosecutor "presents" the request of the investigating officer to the court or "forwards" the request of the investigating officer to the court, it should be construed to be the report of the public prosecutor. There is no scope for such a construction when we are dealing with the liberty of a citizen. The courts are expected to zealously safeguard his liberty. Clause (bb) has to be read and interpreted on its plain language without addition or substitution of any expression in it. We have already dealt with the importance of the report of the public prosecutor and emphasised that he is neither a "post office" of the investigating agency nor its "forwarding agency" but is charged with a statutory duty. He must apply his mind to the facts and circumstances of the case and his report must disclose on the face of it that he had applied his mind to the twin conditions contained in Clause (bb) of Sub-section (4) of Section 20. Since the law requires him to submit the report as envisaged by the section, he must act in the manner as provided by the section and in no other manner. A Designated Court which overlooks and ignores the requirements of a valid report fails in the performance of one of its essential duties and renders its order under Clause (bb) vulnerable. Whether the public prosecutor labels his report as a report or as an application for extension, would not be of much consequence so long as it demonstrates on the face of it that he has applied his mind and is satisfied with the progress of the investigation and the genuineness of the reasons for grant of extension to keep an accused in

further custody as envisaged by Clause (bb) (supra). Even the mere reproduction of the application or request of the investigating officer by the public prosecutor in his report, without demonstration of the application of his mind and recording his own satisfaction, would not render his report as the one envisaged by Clause (bb) and it would not be a proper report to seek extension of time. In the absence of an appropriate report the Designated Court would have no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bonds as directed by the court. Moreover, no extension can be granted to keep an accused in custody beyond the prescribed period except to enable the investigation to be completed and as already stated before any extension is granted under Clause (bb), the accused must be put on notice and permitted to have his say so as to be able to object to the grant of extension."

29. From the above paragraph, it may be noted that the Apex Court has emphasized the purpose of legislature behind the provisions in respect of report of the Public Prosecutor; the Public Prosecutor, being an independent statutory authority, is expected to independently apply his mind to the request of the investigating agency before submitting a report to the Court for extension of time; he is not merely a post office or a forwarding agency and the said report should indicate progress of investigation and disclose justification for keeping the accused in further custody to enable the investigating agency to complete investigation. It is further pointed out therein that the report of the Public Prosecutor must disclose on the face of it that he has applied his mind and satisfied with the progress of investigation and considered grant of further time to complete necessary investigation. Therefore, it has been pointed out by the Apex Court that report of the Public Prosecutor is not merely a formality but a very vital report because the consequence of its acceptance affects liberty of the accused and it must, therefore, strictly comply with the requirements as contained in Clause (bb). In the said paragraph, the Apex Court has reiterated that the report of Public Prosecutor must disclose on the face of it that he applied his mind to the twin conditions contained in Clause (bb) of Sub-section (4) of Section 20 and that, in absence of appropriate report, the Designated Court would have no jurisdiction to deny to the accused his indefeasible right to be released on bail on account of default of prosecution to file challan within the prescribed time if the accused seeks and is prepared to furnish bail bonds as directed by the Court. Notice to the accused had been treated to be presence of the accused in connection with the application for extension and that it need not necessarily be a written notice, but the accused must get an opportunity to contest the application for extension.

30. In the case under consideration, admittedly, the appellants were not produced before the Designated Court on 12-9-2002 while hearing the extension applications and as such, it cannot be said that appropriate notice had been given to the appellants in connection with the application for extension filed by

the prosecution agency. Besides this, after careful scrutiny of the application/report of the Public Prosecutor, we find that the same does not at all enumerate progress of investigation. In the report, general averments are made that both the accused have placed very significant participation in the crime of extorting money from one Ali Reddy of Andhra Pradesh; that naxalite Bacanna is acting in the southern part of the district along with others, who are at large and yet to be arrested and that naxalite activities are intensified in the district of Gadchiroli which has affected the investigation. Except for these general accounts, no progress of investigation as such, during the period of 90 days, has been given in the Public Prosecutor's report. This, prima facie, shows that the Public Prosecutor has not applied his mind as required in terms of the judgment of the Apex Court in *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors.* (supra).

31. The second aspect which is required to be stated in the report of Public Prosecutor namely specific reasons for the detention of the accused beyond the said period of 90 days is conspicuously absent from the said report and the learned Public Prosecutor, by filing an affidavit in reply in the criminal appeals before us, has tried to supplement the said specific reasons, which, obviously, cannot be looked into at this stage. Therefore, the report filed by the Public Prosecutor does not conform to the strict requirement of Section 49(2)(b) of POTA. The fact that the Designated Court took into consideration the case papers and the case diaries, by itself, is not sufficient, since the report of Public Prosecutor must show progress of investigation including the relevant material collected during investigation and once the same is given, obviously, the Public Prosecutor can place all records before the Designated Court including the case diaries. The Public Prosecutor cannot just throw all the material before the Court so that the Court may select the material for the purpose of passing an order on the extension application, but it is the duty of Public Prosecutor to place such material in the report before the trial Court and once such a material is placed before the trial Court, the trial Court, obviously, can look into the record including case diaries. In addition, we would like to point out that the orders on the extension applications filed before the Designated Court are also not clear, but are vague and it appears that the Special Judge has taken grant of magisterial custody remand and extension of the period of investigation as synonymous, which is not so. The Special Court has granted magisterial custody remand till 19-9-2002, but, there is no clear order of extension for the purpose of investigation, though, by reading of the orders as a whole, one may come to such a conclusion.

32. We do not find any merit in the submission of the learned A.P.P. that the orders in question are interlocutory in nature and cannot be challenged in view of the specific provisions of Section 34(4) of POTA.

33. In view of the above, we are of the opinion that the appellants be ordered to be enlarged on bail on execution of personal bonds of Rs. 1,00,000/-(Rupees

One Lakh only) with two sureties in the like amount each, subject to the following conditions :

1) The appellants shall, before being released on bail, furnish correct and complete address of the place where they would be residing within the jurisdiction of the Designated Court.

2) The appellants shall report once a week on every Monday between 10.00 A.M. to 12.00 Noon at Sironcha Police Station till the investigation is complete and the charge sheet is filed.

3) The appellants shall not leave the said place of their residence and move out of the jurisdiction of the Designated Court without seeking permission from the Designated Court and informing the police station concerned about the same.

We may point out that similar conditions were imposed by the Apex Court while ordering release of accused in the case of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, .

The appellants, so released on bail, may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage, as pointed out by the Constitution Bench of the Apex Court in paragraph 48 and conclusion paragraph 53(2)(b) in the case of Sanjay Dutt v. State through C.B.I. Bombay (II) (supra).

The appeals are disposed of in the aforesaid terms.

Hamdast of the operative part of the order be given to the learned Advocates for the Appellants.